No. 20645

# United States Court of Appeals

## FOR THE NINTH CIRCUIT

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THE INTERPUBLIC GROUP OF COMPANIES, INC., a corporation,

MCCANN-ERICKSON, INC., a corporation, and INTERPUBLIC INC., a corporation,

*Appellants,*

*vs.*

ON MARK ENGINEERING CO., a corporation, and SECURITY FIRST NATIONAL BANK,

*Appellees.*

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## REPLY BRIEF OF APPELLANTS

**The Interpublic Group of Companies, Inc., A Corporation, McCann-Erickson, Inc., A Corporation, and Interpublic Inc., A Corporation.**

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## SUMMARY OF ARGUMENT

Appellees' contention that, even though a contract provision is perfectly clear and plain, parol evidence is admissible if such provision "is possibly at odds with the over-all intent of the parties" is completely unsupportable. The legal effect of the clear provisions of the lease option agreement was that the rental obligation was terminable by exercise of the option between the dates specified. The fact that a lease option agreement states

the term of the lease and also specifies a date for exercise of the option which may permit such exercise prior to the end of the term does not create an ambiguity justifying the admissibility of parol evidence.

In any event appellees have not shown that there is any support in the evidence for the court's finding that it was the parties' intent that the option not be exercisable until after the payment of sixty months' rent. Their argument is based only upon what their principal witness did not say, rather than what he did say, and upon two exhibits which do not support their interpretation.

Appellants do not challenge the trial court's findings that Interpublic was in default under the lease. Such default, however, should not have the effect of conferring upon On Mark the right to damages beyond the time the lease agreement was terminable according to its terms. Similarly if Interpublic's default excused On Mark from performance of an obligation it would otherwise have been called upon to meet, Interpublic is entitled to a credit for the value of that performance.

The appellee, Security Bank, acquired no rights in excess of those of On Mark, its assignor. The doctrine of promissory estoppel may not be invoked where the promisor expressly makes known to the promisee that his consent is not intended to induce the latter to take any action at all.

## I. NO AMBIGUITY JUSTIFYING PAROL EVIDENCE WAS SHOWN.

In appellants' opening brief (pp. 12-21) it is demonstrated that the legal effect of the clear provisions of the

lease option agreement was that the rental obligation was terminable by the exercise of the option between the dates specified therein. Appellees' purported answer to this demonstration [Appellees' Br. pp. 15-32] depends primarily upon two untenable premises.

The first untenable premise in appellees' argument is that "even though a contract provision is *perfectly clear and plain,* parol evidence is admissible if such provision *is possibly* at odds with the over-all intent of the parties as expressed in the remainder of the agreements and the circumstances surrounding the making of the contract." [Appellees' Br. p. 26] (Emphasis added.)

The second untenable premise is that construing the lease and option as a single lease option agreement, there is an inconsistency between a stated term of the lease and a date specified for exercise of the option which occurs before the end of the term.

Appellees' claim that a contract provision which is "perfectly clear and plain" may be varied by parol because it is "possibly at odds" with some presumed over-all intent of the parties, is not supported by any authority cited. The requirement is that "the language used is fairly susceptible to one of two constructions," *Barham v. Barham,* 33 Cal.2d 416, 422 (1949). This statement of the rule is quoted in appellees' brief (p. 23) and is irreconcilable with appellees' contention.

Appellants cited several California authorities applying the standard stated in *Barham* to contract provisions relating to time. These cases [Appellants' Op. Br. pp. 19-20] hold that contract provisions clearly establishing a time for peformance or exercise of rights cannot be varied

by parol. Appellees simply ignore these cases which state the long established policy of the California courts prohibiting parol testimony varying "perfectly clear and plain" contract provisions with respect to time. The contract provision in question providing for the exercise of the option "between July 15, 1964 and August 15, 1964" is not "fairly susceptible of one of two constructions." It cannot mean anything other than that the exercise of the option is to be between said dates.

In addition to adopting a wholly unsupportable standard for determining the existence of uncertainty justifying parol, appellees submit a fallacious demonstration of alleged ambiguity. Appellees make much of the fact that though two documents were employed, they constituted a single entire agreement. Appellants have never contended the contrary. The fact, however, that the documents must be construed together does not create inconsistency where there is none. The arguments and authorities of appellants, moreover, all contemplate a single contract embodying both lease and option terms.

The alleged inconsistency from which appellees assume ambiguity is that the lease establishes a term of sixty months and provides for payment of the stipulated rental for the full term, whereas the option provision specifies dates certain when the option may be exercised which may be reached before the term ends.

The provisions dealing with the term, however, are no different from the provisions in any other lease establishing a term. Paragraph 1 of Plaintiff's Exhibit 2 simply and directly states that the term of the lease is sixty months and the rental is $7,747 per month. There

is nothing about the terminology used that suggests, any more than any other lease form would suggest, that extinguishment of the lease prior to the end of the term may not extinguish the obligation to pay rental during the rest of the term. Likewise, the provisions of Paragraph 5-D insuring the lessee possession for the full sixty month term in the event loss of possession is occasioned by repairs made by the lessor, does not purport to deal with the question of extinguishment of the lease prior to the expiration of sixty months.

Appellees claim [Appellees' Br. p. 29] that appellants beg the question because we assume that the option provision "gave to Interpublic the right to exercise the option before the end of the lease term and prior to payment of sixty months' rent." No such assumption whatever is involved in appellants' argument. Such rather is demonstrated to be the clear, legal effect of the lease and option provisions. As pointed out in appellants' opening brief (pp. 27-28), unless extraordinary circumstances enabled appellees to deliver the aircraft in less than the five months it "normally" took to deliver the aircraft, the stated dates for the exercise of the option would fall prior to the end of the term. The lease option, therefore, provided for an option normally exercisable prior to the end of the term. This circumstance brought into operation the rule of law that in such case "the lessor is not entitled to rent after the option to purchase is exercised unless there is in the lease an express stipulation therefor," *Sacks v. Hayes,* 146 Cal.App.2d Supp. 885, 887 (1956). There is no express stipulation for the payment of rent after the exercise of the option. This legal effect is, of course, as much a subject of the parol evi-

dence rule as an express provision that no rent should thereafter be payable. *Buffalo Arms, Inc. v. Remler Co.,* 179 Cal.App.2d 700 (1960).

Despite appellees' assertion to the contrary, the authorities relied upon by appellants do involve leases that specified a given number of monthly rentals. In the *Sacks* case, the finding of the trial court was that "the parties entered into an agreement to lease the premises in question for one year commencing September 1, 1955" at a monthly rental of $125. On appeal, the court found that this was in error and that "the lease was for a period of fourteen months rather than one year." (p. 887) Moreover, the rule stated in the *Sacks* case assumes that there must be a term which extends beyond the exercise of the option, otherwise there would be no occasion to consider extinguishment of such term.

## II. APPELLEES STILL HAVE NOT DEMONSTRATED THAT THERE IS EVIDENTIARY SUPPORT FOR COURT'S FINDING THAT PARTIES' INTENT WAS THAT OPTION NOT BE EXERCISABLE UNTIL PAYMENT OF SIXTY MONTHS' RENT.

The trial court found that the "option period" July 15 to August 15, 1964 was determined by On Mark and Interpublic as follows: The date contemplated by the parties for delivery of the aircraft to Interpublic was October 14, 1959; since the last three months' rent was to be paid in advance, there would remain fifty-seven months beyond October 15, 1959 of a full sixty months' term; and fifty-seven months beyond October 15, 1959 would be July 15, 1964. [Fndg. 9(c), Clk. Tr. 163.]

However, the appellants pointed out in their opening brief (p. 27) that the uncontradicted testimony of Robert O. Denny, President of On Mark, was to the effect that at the time the agreement was executed, it was not in fact contemplated that delivery of the aircraft could be made by mid-October 1959. Knowing that the term of the lease was to start from the date of delivery and that delivery would not take place until about mid-December 1959, On Mark nonetheless drew up and executed the agreement calling for exercise of the option to purchase between July 15 and August 15, 1964. [Rep.Tr. 406, line 11—407, line 1.]

The only conclusion to be drawn from this is that it was not in fact the intent of the parties that On Mark would receive sixty months' rent before the option could be exercised. It was known at the time the agreement was executed that On Mark was not likely under any circumstances to receive sixty months' rent.

In attempting to avoid the effect of Mr. Denny's testimony, appellees in their answering brief advance several explanations, none of which bears close examination.

First, appellees point out that Mr. Denny "did not state that it was impossible" to meet the October delivery date. [Appellees' Br. p. 41.] Appellants submit that what Mr. Denny did say is more to the point than what he did not say. He did say, in response to a question as to when it was estimated that the aircraft would be ready for delivery to Interpublic, that it "*normally*" takes approximately five months for completion of the necessary work. Only one interpretation can be given these words, and that is the one which appellants have urged,

viz., that when the parties signed the lease option agreement and On Mark commenced work on the aircraft in July 1959, On Mark knew that the date of delivery and the commencement of the lease term probably would not occur for approximately five months, i.e., mid-December 1959.

Secondly, appellees blame the delay in delivery of the aircraft on changes and additions to the specifications which were requested by Interpublic. In support of this contention, appellees refer on page 7 of their brief to Plaintiff's Exhibit 87, a letter to Mr. Denny of On Mark from a Mr. Alfred Chase, transmitting revised specifications for electronic equipment to be installed in the airplane. It is to be noted, however, that the date of Plaintiff's Exhibit 87 is July 14, 1959. The lease option agreement itself [Plaintiff's Exhibits 2 and 3] had only been executed four days before, on July 10, and it had been amended by a letter [Plaintiff's Exhibit 4] written on July 13, 1959, by the then Secretary of Interpublic and agreed to on July 15 by Mr. Denny.

Can appellees therefore seriously contend that the receipt of the revised specifications for certain equipment on or about July 15, 1959 really caused a two-months' change in the delivery date that had been contemplated at the time the lease was signed a few days earlier? There is no evidence that On Mark had commenced its conversion work by the date the revised specifications were sent to it and no indication that the revised specifications had anything to do with causing the delay in delivery. Indeed, the record shows that Harder and Denny had previously discussed this electronic equip-

ment which Interpublic wanted included in the aircraft, and On Mark had been informed of it prior to the execution of the lease option agreement. [Rep.Tr. 913-918.] There is no support whatsoever in the evidence for the appellees' statement nor the court's finding that the contemplated delivery date for the plane was changed by reason of the changed electronic equipment requested by Interpublic.

A similar answer applies to appellees' third contention, set forth on page 42 of their brief, that even after the changes to the specifications the parties again expressed their intention to meet an October delivery date. Plaintiff's Exhibit 4 is cited in support of this assertion. It is to be noted that Exhibit 4, the letter to Mr. Denny from Interpublic's secretary, is dated July 13, 1959, thus being practically contemporaneous with the execution of the lease option agreement which it amends. Further, Mr. Denny was cross-examined concerning the circumstances behind this letter. He testified that it was written by Mr. Holme after he had telephoned Holme to discuss certain provisions of the lease and had expressed a desire for relaxation of the requirement that the aircraft be ready for delivery no later than October 14, 1959. [Rep. Tr. 404, line 19 — 405, line 5.] This letter, therefore, did not really express the parties' intention to meet an October delivery date. Rather, it was written because Mr. Denny was aware at the time that the October date would not be met and wanted written assurance that On Mark would not be in default on that account. [Rep. Tr. 405, lines 6-9.]

On pages 21 to 25 of appellants' opening brief, all of the relevant testimony bearing upon the meaning of the lease option agreement with respect to the time of exercise of the option was briefly reviewed. Appellees do not discuss any other testimony in that portion of their brief dealing with this point (pp. 37-43). As noted hereinabove, they only make an argument based upon what Mr. Denny did not say, rather than what he did say, and they call attention to two exhibits which do not support their interpretation.

In their opening brief (p. 30) appellants have also pointed out that it would work no injustice if On Mark were to sell a damaged and repaired aircraft for the option price without having received a full sixty months' rent. The value of the aircraft would be diminished, even though repaired, and Interpublic would have incurred the expense of hiring another aircraft while the repairs were being made.

Appellees answer this by saying that there would be "no necessary diminution" in the value of the plane, and that Interpublic paid less rent than it had paid to On Mark for the aircraft which it leased from a third party during the period of repairs [Appellees' Br. p. 43.]

Whether or not there would be a "necessary diminution" in the value of the plane, this Court knows what everyone knows, to wit, that however repaired, a substantially damaged aircraft would sell for less.

How much "less rent" appellants paid is shown by reference to Plaintiff's Exhibit 22, the lease agreement under which Interpublic leased a less desirable Martin

404 aircraft [Rep.Tr. pp. 827-828 and pp. 871-873] to fulfill its transportation requirements after the On Mark plane had been damaged. The rental called for is $7,500 a month, plus $36 per hour of flight time. At that hourly rate, the rental for the Martin 404 would exceed the rental for the On Mark plane before seven hours flying time per month had elapsed. Since Interpublic would obviously not lease an airplane at this monthly rental for only a few hours of use, it is apparent that the true rental of the substitute was substantially in excess of the $7,747 a month to be paid to On Mark under the lease option agreement.

Obviously, from appellants' point of view, it is irrelevant to whom the rental was paid. Interpublic's program for the "acquisition" of the aircraft contemplated payment of the very substantial rental until the option date with the benefit of the use of the aircraft until such time and then a purchase at the option price. Title and risk of loss of the aircraft was in appellee On Mark [Plaintiff's Exhibit 2, par. 9-10.] Appellees would effectively place a significant aspect of such risk of loss upon appellants by adding the time required to effect repairs to the fixed date for the exercise of the option. To acquire the airplane appellants would thus be obliged to pay not only the full number of rental payments to which On Mark would be entitled in the event no such loss of use occurred, but as well, the rental for a substitute aircraft during the repair period. The total cost of the "acquisition" would thereby be increased by the full amount of the rental for the substitute aircraft. Such a result would have been highly burdensome and unfair to appellants.

It is therefore entirely reasonable to hold appellees to the clear wording of the option provision.

## III. THOUGH INTERPUBLIC'S DEFAULT UNDER THE LEASE EXCUSED ON MARK FROM PERFORMING UNDER THE OPTION, APPELLANTS ARE ENTITLED TO LIMIT DAMAGES FOR RENTAL PAYMENTS TO PERIOD BEFORE OPTION DATE AND TO OFFSET VALUE OF OPTION AGAINST RENTAL PAYMENTS.

Appellees have misconstrued the thrust of appellants' argument in Parts III and IV of the opening brief, wherein it is contended that the trial court erroneously permitted recovery of rent and maintenance costs for a period beyond the option date and erroneously refused to allow the value of the option as an offset against On Mark's recovery of rental payments.

Appellants have not challenged the trial court's findings that Interpublic was in default under the provisions of the lease and that On Mark did not have to deliver the airplane to Interpublic in July 1964. They do, however, challenge the court's conclusion that the effect of this default can be to give On Mark greater rights than it would have had if no default occurred. The agreement which was negotiated with On Mark expressly gave Interpublic the right to terminate the lease by exercise of the option between certain dates, July 15 and August 15, 1964. Termination of the lease would have the effect of terminating the obligation to continue rental payments and would give Interpublic an airplane worth $125,000

for $32,950. Thus, if no default had occurred, On Mark would have received no more than the amount of the rental to the option date and would have been obliged to honor the option which was worth $92,050 to Interpublic. Judgment for the rent is equivalent to receipt of the rent. If Interpublic is by judgment required to pay the rent to the option date, it is entitled to invoke the rights it would have by paying the rent to such date.

The authorities cited by appellants squarely so hold. *Chevrolet Motor Co. v. McCullough Motor Co.*, 6 F.2d 212 (9th Cir., 1925), and the other authorities cited at pp. 33-35 of appellants' opening brief, clearly hold that plaintiff is to be given by judgment only the equivalent of the benefits he was entitled to up to the time the contract was terminable, assuming full performance. In each case defendant was in default of such performance. Likewise, the authorities cited in appellants' opening brief, pp. 37-42, clearly hold that where defendant's breach excuses plaintiff from the performance of an obligation he would otherwise be called upon to perform, defendant is entitled to a credit. For example, in the quotation from McCormick at p. 39, the essence of the rule as stated is that the plaintiff "must give credit, in striking the balance, for whatever he has been saved by being excused from performing."

Appellees have not disputed the principle of law enunciated by these authorities. Indeed, they do not even discuss it. They merely repeat the argument made in Part II of their brief, i.e., that Interpublic was not entitled to exercise the option because it was in default of its obligations under the lease and, therefore, On Mark

did not have to deliver the aircraft on the agreed date for the option price of $32,950. This, of course, is no answer to an argument based upon a principle of law which assumes that by reason of defendant's default plaintiffs were excused from performing pursuant to the option.

## IV. THE DOCTRINE OF PROMISSORY ESTOPPEL MAY NOT BE INVOKED TO SHOW THAT THE SECURITY BANK ACQUIRED RIGHTS IN EXCESS OF THOSE OF ON MARK, ITS ASSIGNOR.

Appellees argue in Part VI of their brief that there was a valid consideration to support an independent obligation owed to the Security First National Bank that Interpublic would not terminate the lease. They contend that since the bank released a third party from his personal guarantee of the On Mark loan after Interpublic had executed the "Receipt and Consent to Assignment" (Plaintiff's Exhibit 9), the doctrine of promissory estoppel may be invoked.

Plaintiff's Exhibit 9 shows on its face, however, that before affixing their signatures thereto, Interpublic's officers deliberately crossed out the language stating that the consent was given to induce the bank to make the loan to On Mark and in consideration of the making of the loan. At the trial, counsel for the bank stated that it did not appear from the evidence that appellants were ever informed of the release of the third party guarantor. [Rep.Tr. 1752, line 20-1753, line 8.]

An essential element of promissory estoppel is certainly that of reasonable expectation by the promisor that his promise will induce action on the part of the promisee. *Section 90, Restatement of Contracts.* Where the promisor goes out of his way to strike the language of inducement from the instrument in question, the corporate officers even placing their initials in the margin of the page to call attention to the change, then it appears highly unreasonable for the promisee to proceed as though there had been no change, not inform the promisor of such action, and then claim that the action was "induced" and that a promissory estoppel exists. If the doctrine of promissory estoppel can be invoked in such circumstances, a promisor is unfairly exposed to liability for almost any type of claim.

The case of *Greene v. Wilson,* 208 Cal.App.2d 852 (1962), cited on page 53 of appellees' brief, is not a case where the promisor had no knowledge of the reliance which his promise induced. It appears from the court's review of the testimony, as set forth on page 859 of the opinion, that the nature of the promisee's reliance was expressly made known to the promisor.

Aside from that point, however, appellants know of no case where a promissory estoppel has been found to exist where the promisor particularly made known to the promisee that his consent was not intended to induce the latter to take any action at all.

## CONCLUSION

The trial court's award of damages to appellees was based upon an erroneous premise that the option to purchase the aircraft was not exercisable at the time specified by the express terms of the agreement. In their answering brief, appellees have not justified the court's departure from those terms. Nor have they answered appellants' argument that Interpublic's default should not have the effect of conferring upon On Mark the right to damages greater than the benefits that would have been received had the agreement been fully performed.

It is again respectfully submitted that the lower court's judgment should be modified by reducing appellees' damages to the amount they would have received had the lease option agreement, properly construed, been fully performed on both sides.

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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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